IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1264

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, LOCAL 790,
Petitioner,

v.

ROBBINS & MYERS, INC.,
Respondent.

No. 75-1276

DORTHA ALLEN GUY,
Petitioner,

v.

ROBBINS & MYERS, INC.,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

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Respondent, Robbins & Myers, Inc. (the Company), files this single brief in response to briefs of Petitioners, International Union of Electrical, Radio and Machine Workers, AFL-CIO, Local 790 (the Union) and Dortha Allen Guy, in Case Nos. 75-1264 and 75-1276 which have been consolidated for argument.

QUESTION PRESENTED

Whether the filing of a grievance pursuant to a grievance-arbitration clause of a collective bargaining agreement tolls the jurisdictional requirement of Title VII (42 U. S. C., Sec. 2000 e-5(d)) that all charges must be filed with the Equal Employment Opportunity Commission within ninety days from the date the alleged unlawful employment practice occurred.

STATEMENT OF THE CASE

Petitioner Guy was terminated by Respondent on October 25, 1971, for failing to report to work following an authorized sick leave. A grievance was filed on behalf of Guy by a co-worker on October 27, 1971, stating: "Protest unfair action of Co. for discharge. Ask that she be reinstated with compensation for lost time." (A. 18a)[1]

Guy learned of her termination of employment on October 29, 1971, when she returned to work. She processed her grievance through the third step of the grievance procedure, where the grievance was denied in writing on November 18, 1971. (A. 18a-19a)

On February 10, 1972, one hundred and eight (108) days from the date of discharge, Guy filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter referred to as EEOC or Commission) wherein she alleged that the Company unlawfully terminated her because of her race and that the Union had not fairly represented her because of her race. The EEOC advised Guy on November 20, 1973, that the Commission found no reason to believe that either the Company or Union had discriminated against her on the basis of race and provided Guy with a "Notice of Right to Sue".

[1] Reference is to the single Appendix.

On February 20, 1974, Guy sought a thirty-day extension within which to file a Complaint in the United States District Court for the Western District of Tennessee. The extension of time was granted, and Guy commenced her court action on March 19, 1974, against both the Company and Union alleging violations of Title VII and 42 U. S. C., Sec. 1981 (A. 4a-9a). Respondent moved to dismiss the Complaint on grounds that:

1) Plaintiff failed to file a timely charge with the EEOC, 2) Plaintiff failed to commence her court action within the time limits of Title VII, and 3) Plaintiff's Section 1981 claim is barred by the Tennessee Statute of Limitations. (A. 14a)

The District Court, on May 30, 1974, dismissed Guy's Section 1981 claim for failure to comply with the applicable Tennessee Statute of Limitations (Pet. 14a-19a);[2] no appeal was taken from this decision. The lower Court allowed the Title VII claim to stand, but reserved ruling on whether the limitation period under Title VII was tolled by the filing of a grievance. Respondent, by way of Motion to Reconsider filed on June 7, 1974, asked the Court to reconsider its order allowing the Title VII claim to stand. (A. 22a). The District Court, upon reconsideration, issued an order on June 12, 1974, in which it dismissed Guy's Title VII claim on the grounds that she had failed to file a charge with the EEOC within the ninety-day period required by Title VII. (Pet. 20a-24a). The District Court relying upon the rationale of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), rejected Guy's argument that the ninety-day period was tolled during the pendency of the grievance proceedings.

Guy, by motion dated June 14, 1976, asked the lower Court to reconsider its dismissal of the Title VII claim (A. 28a-29a). On June 19, 1974, the Court denied Guy's Motion to Recon-

[2] References designated "Pet." are to the Appendix to the Petition for a Writ of Certiorari in Case No. 75-1264.

sider and sustained its dismissal. Upon motions filed by both Guy and the Union, the District Court on August 26, 1974, dismissed the Complaint against the Union and re-aligned the Union as a party plaintiff (A. 30a-40a).

The Union and Guy appealed to the United States Court of Appeals for the Sixth Circuit on the basis that the District Court erred in refusing to hold that the ninety-day statutory period was tolled during the time Guy pursued her contractual remedies. On October 24, 1975, the Sixth Circuit held that the ninety-day period was not tolled and affirmed the dismissal of Guy's Title VII action. (Pet. 1a-12a).[3] On December 9, 1975, the Court denied Petitioner's request for a rehearing. (Pet. 13a).

SUMMARY OF ARGUMENT

A. Congress has established a comprehensive and definitive scheme for remedying employment discrimination under Title VII and has defined with precision the requirements necessary for the proper filing of a charge with the EEOC. Section 706(d) of the Civil Rights Act of 1964 (42 U.S.C. Sec. 2000e-5(d)) is clear and unequivocal in its specification that a charge to be timely must be filed within ninety days from the date of the alleged unlawful employment practice.[4] Both the language of the Act and its legislative history demonstrate Congressional

[3] Contrary to Petitioners' assertion, the Court of Appeals did *not* hold that the 1972 amendment enlarging the period for filing an EEOC charge should not be applied retroactively to charges filed before the amendment. The Court expressly stated that it was not deciding this issue because it had not been raised in the District Court (Pet. 2a, 8a).

[4] Section 706(d) was amended by the 1972 Equal Employment Opportunity Act to increase the time for filing charges in non-deferral states to 180 days. As all relevant facts in this case occurred prior to the effective date of the Amendments, the ninety-day limitation is applicable, and will be cited hereinafter as either Section 706(d) or 42 U. S. C., Sec. 2000e-5(d).

concern for a prompt and specific filing period in order to avoid the litigation of remote charges and to prevent a respondent from being subjected to indefinite liabilities. Congress accomplished its objectives by the ninety-day requirement and the intent of Congress as expressed in Section 706(d) should be given effect.

B. Numerous remedies have been provided for discrimination in private employment and both Congress and this Court recognize that no one remedy is exclusive but all are equally available to an employee. The recent cases of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), together stand for the principle that Title VII, Section 1981 of the Civil Rights Act of 1866 and grievance-arbitration procedures are separate, distinct and independent forms of relief and because of the independent nature of each remedy, Section 1981 is not tolled by filing a Title VII charge. *A fortiori* this Court should also hold that the Title VII limitation period for filing a charge is not tolled by pursuit of a grievance-arbitration procedure.

C. There is absolutely no compelling reason to judicially engraft an exception onto the statutory limitation period. The timely filing of a charge is a jurisdictional prerequisite for any subsequent action pursuant to Title VII and the ninety-day requirement must be strictly construed. Application of a tolling theory is inappropriate in this case. The equitable doctrine of tolling was developed in order to avoid injustice in situations where a person is prevented through circumstances beyond his control from exercising his rights. At no time in the case at bar was Petitioner Guy prevented or hindered in any way from filing a Title VII charge; her failure to file within the statutory time period was no one's fault but her own. To apply tolling under these facts would be a misuse and an abuse of the equitable principle.

Adopting a theory of tolling will abrogate the definitiveness of the statutory limitation period and in essence will place in

the hands of the employer and employees the determination as to when a charge will be filed. Since the grievance procedure is created and controlled by the parties to a collective bargaining agreement, tolling during the pendency of a grievance process will make the statutory filing period dependent upon the designs of the employer and collective bargaining representatives. To allow a party to completely control the timing of his charge can only result in delay and prejudice. The prejudice to an employer is particularly great where, as here, racial discrimination was never alleged during the course of the grievance proceedings, and the Respondent was first put on notice that racial discrimination is in issue at the time the charge was filed. It is unfair to an employer to permit an employee, while pursuing one claim, to toll the limitation period on a completely different charge.

Strictly private acts cannot preserve or create rights that otherwise would not exist. Private attempts of parties at dispute settlement normally do not affect a statute of limitation for filing a claim, and there is no need to make an exception in this case. To do so can only entangle statutory and contractual remedies creating myriad problems and complexities.

II

The issue raised initially by Petitioners in their briefs that the limitation period should commence running from the date the grievance is denied is not properly before this Court and should not be reviewed as the question has not been litigated or decided by the lower Courts. The argument also lacks merit. The alleged discriminatory act which is the subject of grievance and the Title VII charge is the discharge on October 25, 1971. Even though Guy, as in any appellate process, had the right to appeal that decision through the grievance procedure, the act itself occurred and was implemented on October 25, 1971. De-

cisions hold that a discharge is a "completed act" at the time of occurrence, and it is that date which should start the running of the limitation period.

III

A. The question regarding retroactive application of the 1972 Amendments was raised for the first time by the EEOC, as *amicus curiae* in its brief to the Sixth Circuit Court of Appeals. An *amicus curiae* is not a party and has no standing to appeal an issue not raised by the parties. As the question of retroactivity was not before the District Court, the Sixth Circuit refused to consider or decide the issue. Neither of the lower Courts has litigated or determined this issue and, therefore, it is not properly before this Court for review.

B. Title VII both creates the right of action and confers the time within which that right must be asserted; therefore, when the prescribed period has run, both the substantive right and corresponding liability end. At the time Guy filed her charge, it was not only barred but any right of action she may have had under Title VII was extinguished. Applying the 1972 Amendment enlarging the time for filing a Title VII charge retroactively would result in the revival of a barred and extinguished claim, contrary to the established rule that an action which is already barred by limitations cannot be revived by an act of the legislature.

Congress' intent in enacting Section 14 of the Equal Employment Opportunity Act of 1972 was not to revive barred claims but to assure that the new enforcement authority granted the Commission was applicable to charges which were then in the process of investigation and conciliation. It would thus violate well established judicial principles as well as Congressional intent to hold that the 1972 Amendment enlarging the filing time applies retroactively to revive Petitioner's claim.

ARGUMENT

I

Pursuit of Contractual Remedies Should Not Toll the Limitation Period for Filing a Title VII Charge

The sole issue before this Court for review is whether the filing of a grievance pursuant to a collective bargaining agreement tolls the limitation period for filing a charge with the EEOC under Title VII. All relevant acts in this case occurred prior to March 24, 1972, and are governed, therefore, by the preamendment requirement that charges must be filed with the Commission "within ninety days after the alleged unlawful employment practices occurred." 42 U.S.C. Sec. 2000e-5(d).[5] It is undisputed that Petitioner Guy filed her charge more than ninety days from the date of her discharge, the alleged unlawful employment practice. The theory of Petitioners' suit, however, is that pursuit of the contractual grievance remedy tolled the statutory period under Title VII, making the charge filed on February 10, 1972 timely. This is the only issue which has been litigated and determined by the lower Courts. Both the District Court and Sixth Circuit have soundly rejected Petitioners' theory and it is urged that the proper conclusion requires this Court to do the same.

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[5] The ninety-day interval in Section 706(d) applies rather than the 210 days because Tennessee is a non-deferral state.

A. Congress did not intend the ninety day limitation period to be tolled by the filing of a grievance.

1. The Plain Meaning of the Language of Section 706(d) Should Be Given Effect as That is the Best Evidence of What the Legislature Intended.

This Court has stated that "(t)he basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent.' " *Burnett v. New York Cent. R. R.*, 380 U.S. 424, 426 (1965); *Midstate Horticultural Co. v. Pennsylvania R. R.*, 320 U.S. 356, 360 (1943). It has been reiterated many times by the Courts that the primary evidence of legislative intent is the language of the statute. Indeed, there is no better settled canon of interpretation than that which states that language clear and unambiguous must be held to mean what it plainly says. *Caminetti v. United States*, 242 U.S. 470 (1917).

Nothing could be plainer or more definite than the language of 42 U.S.C. §2000e-5(d) which provides that a charge "shall be filed within ninety days after the alleged unlawful employment practices occurred." The limitation requirement which Congress has established for filing charges with the EEOC is rational and fair to both charging party and respondent for it allows a gracious length of time for filing and yet protects a defendant from litigating remote charges by specifying a definitive limitation period. As Section 706(d) is plain and admits of no more than one meaning, its words should be given effect and the time limits prescribed by Congress in that Section should be enforced according to their expressed terms.

2. The Legislative History of Title VII Does Not Support the Tolling Theory.

If statutory language is clear and unequivocal there is no need to refer to legislative history. Legislative history is signifi-

cant only where there is ambiguity to be resolved or where there is a need for interpretation because of an absurd or unreasonable effect by application of the literal words of the statute. *Ex Parte Collett*, 337 U.S. 55, 61 (1949); *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945). Although it is unnecessary to refer to legislative history as the statutory language of Section 706(d) is conclusive and equitable in application, an examination of the legislative record supports the construction which both lower Courts in this case have adopted.

The ninety-day limitation period for filing charges with the EEOC originated in the Senate substitute version of the omnibus civil rights bill H.R. 7152, 88th Cong., 1st Sess. (1963). Title VII of H.R. 7152, as originally passed by the House, did not specify a time limit on filing with the Commission.[6] The Senate version, however, which was approved by the House without change on July 2, 1964, contained a comprehensive scheme for filing and processing charges which included the ninety-day filing limitation. 110 Cong. Rec. 16001-4 (1964); *See also* Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 3026 (1967) hereinafter cited as Legislative History.

Only one exception to this ninety-day requirement was established, i. e. where a person has instituted proceedings with a state or local fair employment agency such person is granted an extended period of time within which to file with the EEOC.[7]

[6] Although the House bill did not prescribe a limitation period for filing a charge with the EEOC, it did provide that no civil action could be based on an unlawful employment practice occurring more than six months prior to the filing of a charge with the Commission. Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of the Civil Rights Act of 1964, 3026 (1967).

[7] Section 706(e) of the Civil Rights Act of 1964 (42 U. S. C. Sec. 2000 e-5(e) states that if a person first institutes proceedings with a state or local agency a charge shall be filed with the EEOC "within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the state or local agency has terminated the proceedings

The purpose of this exception was to accommodate state fair employment laws with the provisions of Title VII. There is no indication that Congress envisioned any other circumstance which would necessitate the extension of the ninety-day period. Applying the principle of construction "to express one thing is to exclude all others", it follows that since Congress provided for only one circumstance where the time for filing would be longer than ninety days, it did not intend there be any other exceptions to its ninety-day requirement.

Congress had the opportunity to add other exceptions in 1972 when it reconsidered and amended provisions of Title VII; however, the only change made in Section 706(d) was the expansion of the time limitation for filing charges from 90 days after an alleged unlawful employment practice has occurred to 180 days in non-deferral states and from 210 days to 300 days where deferral to state or local agency is required. The purpose in expanding the time periods, as stated in the "Section-by-section analysis" is to give aggrieved individuals "a greater opportunity to prepare their charges and file their complaints and that existant but undiscovered acts of discrimination should not escape the effect of the law through a procedural oversight." 118 Cong. Rec. S. 7167 (March 6, 1972); 118 Cong. Rec. H. 7564 (March 8, 1972).[8] Congress was satisfied that this purpose was

under the state or local law, whichever is earlier." The extension of the period for filing with the EEOC for those persons who first invoked state procedures was part of a Congressional plan of cooperation between federal and state authorities in handling charges of discrimination. Congress sought to utilize state fair employment laws and procedures to the maximum extent possible and to this end adopted a deferral plan whereby state and local agencies are given first opportunity to act on a charge of discrimination. *See* comments by Senator Clark (D., Pa.) and Senator Humphrey (D., Minn.), 110 Cong. Rec. 7205; 12721-5; Also printed in Legislative History 3003-8; 3344-5.

[8] Although Congress stated its approval of cases which had interpreted the time limitation to benefit the employee, reference was specifically to the deferral procedure sanctioned in *Love v. Pullman Co.*, 404 U. S. 522 (1972) and to decisions adopting the "continuing" theory of discrimination. Neither of these issues is involved in the present case.

accomplished by increasing the time limits for filing charges. It did not consider it necessary to augment the 180-day and 300-day limitation periods by inscribing a rule of tolling.

Of primary concern to Congress was the need for a definitive period of time for filing charges with the Commission. The absence of Congressional debate or discussion over the Senate Amendment to incorporate time limitations is evidence of the unanimous support which such proposal received. Senators and Congressmen who opposed other provisions of Title VII concurred in the necessity of adopting a precise statute of limitation in order to preclude respondents from being subject to indefinite liabilities and to prevent the litigation of stale charges. *See* 2 U. S. Code Congressional and Administrative News 2175 (1972)

Even where Congress allowed an extension of the ninety-day period in the case of persons filing with state or local agencies, Congress, nonetheless, set a maximum period of two hundred and ten days for filing charges with the EEOC. The fact that a ceiling of two hundred and ten days was established shows that Congress did not intend that the time for filing with the Commission be completely subject to the period for processing a charge before a state or local agency. The possibility of prolonged proceedings before state and local agencies and the resulting indefinite delay in filing with the Commission prompted Congress to write into Title VII certain controls.[9] The portent of such statutory limits cannot be ignored in deciding the present issue. Petitioners' "bootstrapping" position of tolling allows

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[9] In addition to the establishment of a maximum filing period of two hundred and ten days, Congress also set a specific time limit within which state and local agencies are afforded the opportunity to act. Under the deferral scheme of Title VII, state and local agencies are given sixty days within which to seek resolution of a charge, and upon expiration of the sixty-day period, the EEOC may begin its proceedings on the charge. 42 U. S. C., Sec. 2000 e-5(d), as amended.

for no control by Congress—rather, it makes the time for filing charges totally dependent upon the diverse and uncertain periods and procedures for processing grievances designed by employers and collective bargaining representatives. If Congress refused to allow state and local governmental agencies an unlimited period for processing charges, then certainly it is not its intent that the filing of a charge with the Commission be delayed for an indefinite and indeterminable time while parties pursue private contractual remedies.

B. Legal precedent establishes that a limitation period is not tolled by pursuit of separate, alternative remedies.

The question at issue whether pursuit of a contractual remedy tolls the limitation period of Title VII is closely analogous to the issue posed in a variety of factual situations as to whether a statute of limitation is tolled by pursuit of administrative remedies. It is a well-settled rule, for example, in cases involving claims against the United States, that "[w]here the filing of an administrative claim or other proceeding is not made a statutory prerequisite to suit but is only permissive, the statute of limitations is not tolled by the pendency of such a claim." *Camacho v. United States*, 494 F. 2d 1363, 1369 (Ct. Cl. 1974); *See Soriano v. United States*, 352 U. S. 270 (1957). The basis for this rule was aptly expressed in *O'Callahan v. United States*, 451 F. 2d 1390 (Ct. Cl. 1971) and applies with equal if not greater force to contractual remedies:

> "We have repeatedly held . . . that it is a 'recognized, oft-repeated principle that optional administrative remedies do not defer or toll the statute of limitations.' To hold otherwise would serve to induce a potential claimant to sit on his right of action, while running the gantlet of permissive reviews through Boards of Review, Correction or Appeal, all the while running up pay and allowances be-

fore finally seeking relief in the Court of Claims. *See, Crowe v. United States*, 452 Ct. Cl. 1034, decided today. This is not within the spirit or intention of statutes of limitation." (451 F. 2d at 1393)

The principle that a statute of limitation is not tolled by pursuit of administrative remedies has been applied in cases involving claims of employment discrimination. Recently, this Court had occasion to rule on the question of tolling with respect to the relationship of Title VII and Section 1981 of the Civil Rights Act of 1866 in the case of *Johnson v. Railway Express Agency, Inc., supra.*[10]

The issue presented in *Johnson* was whether the timely filing of a charge of employment discrimination with the EEOC tolls the running of the period of limitation applicable to an action based on the same facts instituted under 42 U. S. C., Sec. 1981. Petitioner Johnson advanced similar arguments to support his position of tolling that are being urged by Petitioners in the instant case. This Court after carefully considering the legislative history of Title VII rejected Johnson's position and held that the filing of a charge with the EEOC does not toll the statute of limitations applicable to Section 1981. The basis for this decision was that Title VII and Section 1981 "although related, and although directed to most of the same ends, are [nonetheless] separate, distinct, and independent." 95 S. Ct. at 1721.

Johnson relied upon *Alexander v. Gardner-Denver Co., supra*, a case in which the relationship of the various employment remedies, and in particular Title VII and the grievance-arbitration machinery of collective bargaining agreements, was

[10] Of interest is the fact that *Johnson* follows the same case history thus far as the case at bar. District Court Judge Harry Wellford who decided the instant issue also decided the *Johnson* case. His opinion in *Johnson* was affirmed by both the Sixth Circuit Court of Appeals and the Supreme Court.

the subject of extensive discussion.[11] In *Alexander*, this Court after careful examination of legislative history and of the functions and procedures of Title VII and the grievance-arbitration process concluded that the two remedies are "legally independent" in origin and are of a "distinctly separate nature." In discussing the difference between submitting a grievance to arbitration and filing a suit under Title VII, the Court said:

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums. The resulting scheme is somewhat analogous to the procedure under the National Labor Rleations Act, as amended, where disputed transactions may implicate both contractual and statutory rights." 415 U. S. at 49-50.

The principle is thus established in fair employment law that Title VII, Section 1981 and grievance-arbitration procedures are separate, distinct and independent forms of relief. Based upon the independent nature of each remedy, pursuit of administrative remedies pursuant to Title VII does not suspend the limitation period applicable to a Section 1981 suit.[12]

[11] *Alexander* holds that an employee's statutory right to a trial *de novo* under Title VII is not foreclosed by prior submission of his claim to final arbitration under the non-discrimination clause of a collective bargaining agreement.

[12] Recent decisions have relied upon *Alexander* and *Johnson* in holding that the pendency of an administrative remedy does not suspend the limitation period of a federal statutory remedy. The Eighth Circuit in *Chambers v. Omaha Public School District*, — F. 2d —, 11 EPD Para. 10,911 (8th Cir. 1976) citing *Johnson, Ca-*

A fortiori pursuit of contractual remedies should not toll the limitations period for filing a Title VII charge. The right to pursue a Title VII remedy is in no way dependent upon resort to or exhaustion of a private contractual remedy; rather, Title VII offers a separate and additional forum for resolving claims of discrimination. If this Court declined to allow a federal statutory right to toll a state statute of limitation, then certainly the mere filing of a grievance pursuant to a contractual agreement should not suspend the Congressional scheme for filing Title VII charges.[13]

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macho, supra, 494 F. 2d 1363, and *Soriano, supra,* 352 U. S. 270, held that a teacher's permissive resort to Department of Health, Education and Welfare (H. E. W.) remedies pursuant to 42 U. S. C. Sec. 2000(d) will not toll the statute of limitations applicable to a Section 1981 or Section 1983 claim. In *Washington v. Chrysler Corp.,* — Mich. App. —, 12 EPD Para. 11,023 (1976), the Court held that a racial discrimination claim filed with the state Civil Rights Commission does not toll the running of a statute of limitations applicable to a civil action based on the same facts. In so holding, the Court stated that it was following recent decisions by this Court which have stressed the independence of the contractual and statutory rights which an employee may assert against discriminatory employment practices. *See also International Union of U. A. W. v. Hoosier Cardinal Corp.,* 383 U. S. 696 (1965), holding that an unsuccessful class action brought by employees in a state court did not toll the state statute of limitation for bringing suit in federal district court under the Labor Management Relations Act, and *Barnhart v. Western Maryland Ry.,* 41 F. Supp. 898 *aff'd,* 128 F. 2d 709 *cert. denied,* 317 U. S. 671, where pursuit of relief from Railroad Labor Board, National Mediation Board and other federal departments or agencies did not toll the applicable statute of limitation for invoking federal jurisdiction.

[13] *Alexander* and *Johnson* have been the bases for lower Courts' holdings that resort to grievance procedures under a collective bargaining agreement does not toll a statutory limitation period. *See Sled v. General Motors Corp., Fisher Body Div.,* 405 F. Supp. 987 (E. D. Mich. 1976); *Chrysler Corp. v. Michigan Civil Rights Commission,* — Mich. App. —, 12 EPD Para. 11,031 (1976); *Roberts v. Lockheed Aircraft Corp.,* — F. Supp. —, 11 FEP Cases 1440 (C. D. Calif. 1975); *See also* cases predating *Alexander* and *Johnson* holding that contractual grievance proceedings do not toll a statutory limitation period, e. g. *Beach v. International Union of U. A. W.,* 19 Mich. App. 560 (1969); *Condol v. Baltimore & O. R. Co.,* 199 F. 2d 400 (D. C. 1952).

C. There is no compelling reason to engraft an exception onto Section 706 (d)

1. The Ninety-Day Limitation Period Is Jurisdictional and Should Not Be Suspended by the Equitable Doctrine of Tolling

At issue in the case at bar is not just a general statute of limitation but, rather, a comprehensive statute which creates a new cause of action and which contains a specific time limit thereon. Time restrictions contained in the same statute which creates the cause of action act as a limitation on the right itself, and are subject to a more strict construction than ordinary statutes of limitation.[14] The jurisdiction of the federal courts to hear Title VII actions is derivative from the statute itself and the ninety-day period for filing a charge with the EEOC is a jurisdictional prerequisite to bringing suit. *McDonnell Douglas Corp. v. Green,* 411 U. S. 792, 798 (1973).

Unlike ordinary statutes of limitation which are subject to waiver and other equitable considerations, a jurisdictional defect cannot be waived or cured even by consent of the parties. If the jurisdictional prerequisite, which operates as a condition of liability, has not been met, there can be no recovery because the Court lacks subject matter jurisdiction and must dismiss. As the ninety-day limitation period for filing Title VII charges is jurisdictional, it must be strictly construed and may not be suspended by adopting the equitable doctrine of tolling.

Despite clear pronouncements by this and other courts that the ninety-day limitation in Title VII is jurisdictional, some

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[14] *EEOC v. Louisville and N. R. R.,* 505 F. 2d 610 (5th Cir. 1974), *cert. denied* 423 U.S. 824 (1975); *United States ex rel. Texas Portland Cement Co. v. McCord,* 233 U. S. 157 (1914). The Court of Appeals in its opinion below espouses these principles and cities in support this Court's opinion in *The Harrisburg,* 119 U. S. 199 (1886) (Pet. 5a-7a)

courts have discussed the limitation period in terms analogous to how statutes of limitations are construed. Petitioners, here, by urging tolling, would have this Court apply to the ninety-day requirement the same type of equitable modification that is applied to statutes of limitation. Even assuming this Court finds it appropriate to consider equitable principles, Petitioners arguments for tolling the ninety-day period are not meritorious.

An examination of the case law on statutes of limitation and the circumstances which have been held to warrant suspension of the limitation period shows that the facts of the instant case are not such as to merit application of the equitable doctrine. It is an established principle of statutory construction that restraint must be exercised in interpreting statutes of limitation and such statutes are not to be construed so as to defeat their intent to secure prompt enforcement of claims. *Kavanagh, Collector of Internal Revenue v. Noble*, 332 U. S. 535 (1947), *rehearing denied* 333 U. S. 850 (1948); *Campbell v. Haverhill*, 155 U. S. 610 (1895). Decisions evidence a wariness against expanding the jurisdiction of the federal court by judicial interpretation. *American Fire & Casualty Co. v. Finn*, 341 U. S. 6, 17 (1951); *Jerome v. Viviano Food Co.*, 489 F. 2d 965 (6th Cir. 1974). As this Court stated in *Holmberg v. Armbrecht*, 327 U. S. 392 (1946):

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." 327 U. S. at 395.

Courts have been exceedingly guarded in implying exceptions which would enlarge time periods and recognize only a limited class of exceptions arising from absolute necessity. Justification for a tolling theory lies in the general rule that "whenever some paramount authority prevents a person from exercising his legal remedy, the time during which he is thus prevented is not to be counted against him in determining whether the statute of

limitations has barred his right." *Wagner v. New York, Ontario and Western Ry.*, 146 F. Supp. 926, 929 (M. D. Pa. 1956), and cases cited therein. Thus, the crux of the tolling principle is that plaintiff has been *prevented* through no fault of his own from exercising his rights. In such cases, the Court has attempted to prevent the injustice of penalizing a person who is incapable of bringing suit.[15]

Petitioner, in the case at bar, was operating under no handicaps which prevented or hindered her from filing a timely charge with the EEOC. She was not tricked or misled in her actions, and she cannot claim detrimental reliance on an erroneous administrative opinion or policy decision.[16] Petitioner was fully able at any time during the ninety-day period to file a charge; she simply failed to comply with the time limitations of Title VII. There is no justifiable reason in the case at bar for not applying the explicit filing period designated in Title VII. There is nothing unduly burdensome or unreasonable in requiring an employee who desires to pursue both contractual and statutory remedies to file within the time limits for each remedy. This asks a person to do nothing more than follow the requirements prescribed for each remedy.[17]

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[15] Circumstances which hinder or prevent suit and which, therefore, have been recognized by courts as cause for suspending the running of a statute of limitation fall into three categories: Those in which plaintiff's cause of action has been fraudulently concealed from him; those resulting from a legal prohibition against suit; and those in which plaintiff is operating under a disability preventing initiation of suit. Developments in the Law "Statutes of Limitations," 63 Harv. L. Rev. 1177, 1220-1237 (1950); "Clayton Act Statute of Limitations and Tolling by Fraudulent Concealment," 72 Yale L. J. 600 (1962-63).

[16] *See Ferguson v. Kroger Co.*, — F. Supp. —, 11 EPD, Para. 10,720 (S. D. Ohio 1975), holding that the filing of discrimination charges with the wrong EEOC regional office did not toll the jurisdictional prerequisite of timely filing with an appropriate state agency in the absence of evidence that plaintiff had acted on misinformation by the agency.

[17] It is significant that Guy in the charge filed with the EEOC and the Complaint filed in Federal District Court also accused the

2. To Permit Tolling Will Allow Parties to a Collective Bargaining Agreement Through the Grievance Procedure They Design to Determine the Time for Filing a Charge.

Congress, which so meticulously prescribed the procedure and time period for filing all charges with the EEOC, never intended its prescriptions to be dependent upon the multifarious approaches and limitation periods for resolving grievances devised by employers and collective bargaining representatives. A study by the Bureau of Labor Statistics conducted in 1964 of 1,717 major agreements shows that the process through which unresolved disputes move from complaining worker to ultimate settlement varies considerably among agreements, reflecting different plant and company organizational or decision-making structures. Bureau of Labor Statistics, *Major Collective Bargaining Agreements: Grievance Procedures*, Bull. No. 1425-1 (1964). The study found that grievance procedures range from a simple informal one-step process to highly formalized procedures of six or more steps, culminating in mediation and/or arbitration.

Equally as varied are the time limits established by the parties for processing an employee's grievance. While some collective bargaining agreements designate time intervals for each phase of the procedural steps, including time limits on management's answer in each step, other agreements fix only an overall time for completion of the process. Some agreements contain no time limits at all for processing grievances: others simply

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Union of racially discriminatory conduct in not adequately representing her. Equity would dictate that at the very least, Petitioner should not be entitled to the equitable doctrine of tolling where she by her conduct has admitted that, in her view, the grievance procedure was not sufficient to adequately treat or remedy her claim of racial discrimination, assuming *arguendo* that she had perceived such a claim at the time her grievance was processed.

specify a "reasonable" time.[18] Although most agreements contain limitations on the initial submission of a grievance, the study by the Bureau of Labor Statistics reports that limits may range from as little as two or three days after occurrence of the event giving rise to a grievance to intervals as long as a year. Bull. No. 1425-1, pp. 37-41. Furthermore, different limitation periods may be prescribed for different types of grievances. Limitations on the time for appealing to subsequent steps of the grievance procedure were found to range anywhere from several days to several months, with many contracts containing provisions permitting extension of time limits for an indefinite period. Thus, depending upon the agreement reached by the parties the time allowed to complete a grievance procedure may be several days, several months or several years—the determination lies with each employer and collective bargaining representative, subject only to ratification by the employees.

Clearly, a statutorily prescribed limitation period should not be made contingent upon a process indeterminate and variable in duration. To accept Petitioners' tolling argument will suspend, in each case, the time for filing a charge with the Commission for a different period of time, dependent upon what the parties to a collective bargaining agreement establish. It is obviously not the intent of Congress that the time for filing a Title VII charge should be so indefinite and uncertain.

To toll the ninety-day requirement of Title VII during the pendency of a grievance will undoubtedly result in charges of discrimination being filed months and even years after the time limits imposed by Congress have expired. Essentially, the determination of when a charge shall be filed will rest, not with Congress where it should lie, but with the parties to a collective

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[18] For a discussion of the variety of limitation periods for processing grievances adopted by parties, see Elkouri and Elkouri, *How Arbitration Works*, 146-54 (Third ed. 1973).

bargaining agreement. If the tolling theory were upheld, the parties would be able to manipulate the time for filing charges with the EEOC not only by the grievance procedure they design but also by their conduct in applying the process. To permit a party to exercise complete control over the timing of his charge will inevitably foster delay. Arbitration annals are replete with cases in which, despite specific time limits, parties have delayed months and years before proceeding to subsequent steps in the grievance procedure.[19] Indeed, it is a recognized principle of arbitral law that the practice of parties in loosely applying time limits for processing grievances excuses rigid adherence to these limitation periods; time limits become suggested restraints, rather than rigid rules for appeal. *Coca Cola Co.*, 65 Lab. Arb. 165, 169 (Crane, 1975), *How Arbitration Works, supra* n. 18 at 146-54.

Far from being an expeditious method with a definitive time period for resolving disputes, the grievance procedure too often is an indefinite, time-consuming process by which either party can harass the other through excessive resort to filing and deleterious delays in processing grievances. The potential for abuse and harassment against an employer would be even greater if Petitioners' argument were accepted because a grievant could file a grievance tolling the Title VII limitation period, leisurely proceed to prosecute his grievance through a grievance procedure, and years later file a timely charge claiming dis-

[19] *See, e.g. Bell Aircraft Corp.*, 24 Lab. Arb. 324 (17 month delay between second and third step of grievance procedure; arbitration award issued 5½ years after alleged unlawful incident occurred); *West Virginia Pulp and Paper Co.*, 39 Lab. Arb. 163 (Union delayed 11 months in requesting list of arbitrators); *Lake Shore Coach Co.*, 44 Lab. Arb. 1190 (Discharge grievance discussed with employer at irregular intervals over period of ten months before demand for arbitration was made); *Boston Mut. Life Ins. Co. v. Insurance Agents' Int'l. Union*, 268 F. 2d 556 (1st Cir. 1959) (Union delayed 10½ months after final meeting with employer before requesting arbitration). *Flintkote Co.*, 51 Lab. Arb. 74 (2 month delay in choosing arbitrators; arbitration award issued 10 months after grievance filed).

crimination based on Title VII. If a grievant, during the course of the grievance proceedings, merely alleged "unfair action" on the part of the employer, as was alleged in this case, then it would be years after the alleged unlawful incident occurred before an employer would know that he was being accused of actions violative of Title VII.

Incorporating the principle of tolling into the filing scheme of Title VII will only result in further delay in filing and processing charges with the EEOC. In designing the procedures of Title VII, Congress has specifically set a limitation period and has manifested its intent that there be a *precise* period within which charges are to be filed. It would thwart Congressional intent to permit tolling and thereby place in the hands of the employer and employees the determination as to when a charge shall be filed.

3. To Toll the Ninety-Day Requirement Is Prejudicial to a Respondent Where Racial Discrimination Was Never Alleged in the Grievance Procedure.

To sanction tolling under the facts of this case would be unjust and prejudicial to Respondent inasmuch as Petitioner Guy never raised the allegation of racial discrimination during the entire course of the grievance proceedings. The grievance submitted and processed under the collective bargaining agreement protests "unfair action" on the part of Respondent in discharging Guy (A. 18a). There is no reference in the written grievance to any provision of the contract which it is alleged was violated by Respondent. It is undisputed that racial discrimination was not explicitly alleged and neither can it be argued that there is an implied allegation of racial discrimination. The phrase "unfair action" is not synonymous with "racial discrimination" and does not necessarily imply reference to the

non-discrimination clause of the Agreement in effect at the time Guy's grievance was filed.[20]

The first knowledge Respondent had that racial discrimination was in issue was upon receipt of the notice of the charge filed by Guy 108 days after her discharge. Her assertion of racial discrimination and resort to the EEOC were afterthoughts, pursued only after her first claim was unsuccessful. Contrary to Petitioners' contention, Guy has not diligently prosecuted her claim of racial discrimination, but has slept on her rights, asserting racial discrimination well beyond the statutory limitation period of Title VII.[21]

The failure to put Respondent on timely notice that it would be forced to defend a claim of racial discrimination is prejudicial to Respondent. The evidence necessary to defend under a grievance-arbitration procedure an allegation that a discharge constituted "unfair action" is not necessarily the same evidence needed to defend a charge of racial discrimination with the EEOC based on the same set of facts. The issue in a grievance-

[20] In the context of labor-management relations, an allegation of "unfair action" against an employer customarily connotes conduct disparaging to an employee because of his status as a Union member or supporter. *Park & Tilford Import Corp. v. Teamsters Local 848*, 27 Cal. 2d 599, 165 P. 2d 891, 900 (1946); *J. F. Parkinson Co. v. Building Trades Council of Santa Clara County*, 154 Cal. 581, 98 P. 1027, 1029 (1908).

Article XXXI, the non-discrimination clause of the 1969 Agreement, which was effective in 1971, forbade discrimination on the basis of "sex, race, color, or creed". Therefore, assuming *arguendo*, "unfair action" could imply a violation of the non-discrimination article, Respondent would not know the exact basis of discrimination which grievant is protesting.

[21] A review of the history of Petitioner's actions in this case demonstrates her lack of diligence in pursuing her claims: The Chief Steward, not Petitioner, filed her grievance. Despite Petitioner's claim there is no evidence that she actively processed her grievance through the grievance procedure. Petitioner waited almost three months after the grievance was denied before she filed her charge with the EEOC. Twenty-one months later, the EEOC issued a determination letter, together with a right to sue letter, finding no

arbitration process is whether the employer had just cause to discharge a grievant; the focus in a racial discrimination charge before the EEOC is whether the charging party was treated differently from persons of other races similarly situated. Although an employer may have "just cause" under a grievance procedure for discharging an employee, if the employer administers disciplinary action disparately he has violated Title VII. Essential in a determination by the EEOC is the comparative data submitted by an employer. An employer who is not put on timely notice that racial discrimination is in issue does not have the opportunity to protect itself against the loss of evidence,[22] the disappearance and fading memories of witnesses and the unfair surprise that results from asserting a claim that has been allowed to slumber. It is plainly unfair that a defendant should gather his evidence and prepare his defense against one theory of liability and then long after the statutory period of limitations has expired be forced to defend a completely new claim.

4. The Remedies Available for Racial Discrimination in Employment Are Legally Separate and Independent and Should Not Toll One Another.

The efforts to remedy employment discrimination have produced a variety of forums and alternative bases for obtaining

cause to believe Petitioner had been discriminated against. Petitioner could have obtained a right to sue letter during this twenty-one month period—she did not. After receiving the determination letter and right to sue notice, Petitioner failed to act until the last day of the ninety-day period. At that time she simply went to the District Court Clerk's office to find out what she should do. The total course of conduct by Petitioner belies the claim that she acted with diligence throughout these proceedings.

[22] The EEOC requires employers to keep employment and personnel records only for six months, the length of time within which an employee must file a charge. (29 C.F.R. § 1602.14) If an employee waits until grievance proceedings are complete before filing with the Commission, it is likely the employer will no longer have necessary records.

relief. Among the remedies available to an employee in addition to Title VII and the procedures established under a collective bargaining agreement are the Civil Rights Act of 1866 (42 U. S. C. § 1981), the Fair Labor Standards Act as amended by the Equal Pay Act of 1963 and subsequent 1966 and 1974 amendments (29 U. S. C. § 201 et seq.), the National Labor Relations Act (29 U. S. C. § 151 et seq.),[23] and a host of state fair employment laws. If an enterprise is under contract with the Federal Government, Executive Order No. 11246 (3 C. F. R. 339 (1967)) establishing the Office of Federal Contract Compliance, offers another avenue of relief. A plaintiff, therefore, is able to pursue his claim of discrimination in a variety of forums including state courts, federal courts, state and municipal fair employment agencies, federal agencies, or the Department of Labor.

When Congress enacted Title VII, it was cognizant of the many remedies available for employment discrimination and specifically refused to make any one remedy the exclusive means for relief.[24] *See* 110 Cong. Rec. 7207 (1964), interpretative memorandum by Senator Joseph Clark, one of the sponsors of the Senate Bill. This Court noted in *Alexander, supra*, that Congress has clearly manifested its intent that a person be allowed

[23] Although the National Labor Relations Act was enacted primarily for purposes other than preventing racial discrimination, such cases as *NLRB v. Miranda Fuel Co.*, 326 F. 2d 172 (2d Cir. 1963) and *United Packinghouse, Food and Allied Workers Int'l Union v. NLRB*, 416 F. 2d 1126 (D.C. Cir. 1969), *cert. denied* 396 U. S. 903 (1969), have established the principles that Section 7 of the NLRA gives employees the right to be free from racially discriminatory practices, and that discrimination on the part of an employer violates Section 8 (a) (1) of the NLRA.

[24] The Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices 110 Cong. Rec. 13650-13652 (1964) and a similar amendment was rejected during the debate over the Equal Employment Opportunity Act of 1972. See H. R. 9247, 92d Cong., 1st Sess. (1971) and 2 U. S. Code Cong. and Admin. News, 92d Cong. 2d Sess. (1972) pp. 2137, 2179, 2181-2182.

to pursue his rights independently under the various remedies. Title VII is equally available to an employee regardless of whether that employee waives, ignores or concurrently pursues contractual rights.

Each available remedy for employment discrimination provides distinct techniques and procedures, including separate limitation periods. These limitation periods vary in origin, duration and in the procedures designed to commence the running of the period. Considering the number of remedies established for employment discrimination, it is obvious that if each remedy were allowed to toll the limitation period for every other remedy the effect would be to permit ten to twenty-year-old claims to be litigated.

By according independent, parallel remedies against discrimination an employee can avail himself of the distinct advantages of each remedy unencumbered by any defects or impediments associated with other remedies. To permit tolling, however, will obviate this advantage and entangle each tolled remedy in the complexities and obstacles of the tolling remedy. Thus, to suspend the limitation period in Title VII during the pendency of a grievance will enmesh the statutory remedy with myriad contractual problems, and will force courts to decide issues of contract interpretation which are properly reserved for arbitrators.

For example, since grievance procedures differ under each collective bargaining agreement, to allow tolling will necessitate a determination in each case as to when and how a grievance is filed under the grievance-arbitration provisions and as to whether an employee has properly complied with the prescribed procedure.[25] In addition, courts will be confronted

[25] Many agreements do not specify with clarity just how grievances may be initiated. Some agreements leave it to the employee to decide whether he wants to make a direct complaint to the super-

with uncertainties as to when the tolling period ceases. Tolling the Title VII period during the pendency of a grievance could result in the permanent suspension of the Title VII limitation period, because it is possible that a contractual grievance procedure may never be completed. Since the Union is responsible for processing a grievance through the various steps of a grievance procedure a Union could fail to press a grievance to conclusion. An employee, then, would always be able to successfully argue, no matter when he filed a Title VII charge, that it is timely.

Even if a grievance is submitted to arbitration and an award issued, this is not necessarily the end of the process as a grievant may seek judicial review of an arbitrator's award. Waiting until the judicial procedure is complete could well mean that the limitation period of Title VII is tolled for several years. It is also commonplace for challenges to arbitrability to be coupled with a grievance and raised by a party either before the arbitrator or in the courts. The issue of arbitrability is of significance only to the contractual remedy; yet, adopting a tolling theory will suspend the time for filing a charge until both the issue of arbitrability and the merits of the grievance are resolved. There is no justification for delaying the resolution of the merits of

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visor or refer the problem initially to a union steward. In such contracts it is often unclear as to which of the two—the employee or steward—is authorized to launch a formal grievance process. 2 BNA Coll. Barg. Neg. and Contracts 51:1 (1970) As Section 9 (a) of the National Labor Relations Act (29 U. S. C. § 159) allows employees to present grievances to their employer and to have such grievances adjusted without the intervention of the bargaining representative, the court will have to decide in each case whether an employee in making a complaint was utilizing the prescribed grievance procedure or attempting to adjust his complaint on his own. If the court determines that an employee has resorted to a grievance procedure and if the agreement is unclear as to what action commences the grievance process a court may then be faced with a determination of whether an employee's oral complaint to a supervisor will suffice to toll the Title VII limitation period or whether only a written complaint will toll the period.

a discrimination charge under a statutory remedy while a procedural issue of relevance only to the arbitration process is litigated.

Petitioners' prediction that the national labor policy favoring private resolution of disputes will be undermined and jeopardized unless tolling is adopted is completely groundless. (Brief for Petitioner in No. 75-1276 pp. 17-20; Brief for Petitioner in No. 75-1264, pp. 39-40). The Supreme Court, in *Alexander, supra*, points out that certain actions may violate both a collective bargaining agreement and Title VII of the Civil Rights Act. Other actions may violate only the collective bargaining agreement and the National Labor Relations Act. In both situations, the Court said "the relationship between the forums is complementary since consideration of the claim by both forums may promote the policies underlying each." 415 U.S. at 50.

There is nothing to prevent an aggrieved person from filing a charge concurrently in the separate forums. Contrary to Petitioners' contention that a Title VII charge will hinder efforts to settle a grievance (Brief for Petitioner in No. 75-1276, p. 19; Brief for Petitioner in No. 75-1264, p. 32), it is submitted that the knowledge that an EEOC investigation will be conducted if settlement is not reached may provide the necessary impetus for an employer's resolution of the grievance. If a grievance is resolved favorably to a plaintiff under the grievance-arbitration machinery, he can simply withdraw his EEOC charge. Such a procedure would allow the plaintiff to take advantage of the different remedies and at the same time would preserve the precise time limits that Congress has established.

It is significant to note, also, that the filing of a grievance does not toll the limitation period for filing a charge with the

National Labor Relations Board.[26] The limitation period is strictly enforced and if a charge is not filed within the six-month period required by Section 10(b) of the Act, the Board refuses to process the charge. *See e. g. Schott's Bakery, Inc.*, 159 NLRB 1040 (1966); *Hilton Mobile Homes*, 155 NLRB 873 *enf'd in part on other issues*, 387 F. 2d 7 (8th Cir. 1967).

All of the arguments made by Petitioners to justify tolling have been considered and rejected by this Court in *Johnson, supra*, and are, in fact, entitled to even less weight in the instant case. Failure to toll the Title VII limitation period does not penalize an employee for resorting to contractual remedies as argued by Petitioners (Brief of Petitioner in No. 75-1276, p. 20, Brief for the United States as Amicus Curiae, p. 26), but merely requires that an employee observe the statutory time limits imposed. If there were no collective bargaining agreement in force, an aggrieved party would not be excused from timely filing with the EEOC, and there is no reason to excuse compliance with the jurisdictional requirements simply because an additional remedy has been provided by contract. "Title VII strictures are absolute", (*Alexander, supra*, at 51) and should apply equally to all employees regardless of their Union status.[27]

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[26] The Advice Memorandum upon which Petitioner in No. 75-1276, p. 19, n. 30 relies to support its assertion that the Office of the General Counsel of the NLRB sanctions a policy of tolling the Section 10(b) limitation period for filing an unfair labor practice charge while a grievance is pending was issued during the term of former General Counsel Peter G. Nash and was based upon those Title VII cases decided prior to *Johnson, supra*. There is no Board decision which has decided the issue and in light of *Johnson* and the appointment of a new General Counsel, John S. Irving, it cannot be assumed the Board would approve a tolling theory if presently faced with the issue. Of note, also, is the observation in the Advice Memorandum that under the NLRA, arbitration is afforded a far more significant and decisive role than under Title VII. Memorandum p. 10.

[27] Many non-Union companies also have procedures for adjusting disputes. If tolling during the pendency of a contractual remedy were approved, courts would then be faced with the question of whether Title VII is tolled by pursuit of other non-contractual procedures. To hold that Title VII is not tolled is to discriminate against non-Union employees for no reason. However, to hold that it is tolled will confront courts with a multitude of problems concerning these non contractual grievance procedures.

Based upon the foregoing arguments, it is respectfully submitted that the better-reasoned approach holds that Title VII is not tolled during the pendency of a grievance.

II. Petitioners' Contention That the Limitation Period Begins to Run From the Date the Grievance Is Denied Is Lacking in Merit

A. The issue has not been timely raised and should not be considered

Petitioners in their briefs to this Court raise as an issue for the first time in this case the contention that the ninety-day limitation period began to run from the date the Company denied Guy's grievance, rather than from the date of her discharge.

By asserting this issue initially in their briefs, Petitioners have violated one of the expressed rules of this Court prohibiting a party from raising additional questions in a brief on the merits. Rule 40 (1) (2) U. S. S. Ct., as amended 1975. It is an established policy that this Court will not decide a point urged in an attack upon a judgment below, where the question was not raised or litigated in the lower courts. *De Sylva v. Ballentine*, 351 U. S. 570, 582 (1956); *McCullough v. Kammerer Corp.*, 323 U. S. 327, 380 (1945); *Helvering v. Minnesota Tea Co.*, 296 U. S. 378 (1935); *Zellerbach Paper Co. v. Helvering*, 293 U. S. 172, 182 (1934). There is no reason here to depart from this principle.

B. The limitation period in Section 706(d) begins to run from the date of discharge

Termination of employment by discharge is not a "continuing violation," but is a "completed act" at the time it occurs. *Olson v. Rembrandt Printing Co.*, 511 F.2d 1228, 1234 (8th Cir. 1975); *Doski v. M. Goldseker Co.*, — F.Supp. —, 10 EPD Para. 10,528 (D. Ma. 1975); *Buckingham v. United Air Lines*, — F.Supp. —, 11 FEP Cases 345 (C.D. Calif. 1975). Any charge alleging a discriminatory discharge must be filed, therefore, within the time limits from the date of that completed act.

The argument that the limitation period began to run on November 18, 1971, at the conclusion of the third step of the grievance procedure, rather than October 25, 1971, the date of discharge, is based on the erroneous premise asserted that Guy's discharge was not final until the Company denied her grievance in writing. Such an assertion completely ignores the fact that Guy's employment relationship with Respondent was severed as of October 25, 1971.[25] The grievance steps were not a condition precedent to the decision to terminate but rather were the consequence of the Company's decision having been made and implemented. Petitioner by processing her grievance through the steps was merely exercising her right to appeal that decision.

If every decision made by an employer is considered "tentative and non-final" until an appellate process is exhausted, a limitation period could never commence until this Court had ruled on every issue. The absurdity of such a position is illustrated in this case. Almost five years have elapsed since the

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[25] *See Doski, supra,* holding that neither the employer's agreement to an extended severance pay arrangement nor the continuation of the complainant on the company health insurance policy could keep the employment relationship alive or otherwise toll the running of the time limit for filing a Title VII charge.

date of Guy's discharge and a court has yet to rule on the merits of Guy's complaint. If this Court decides the present procedural issue in favor of Petitioner, then it may well be another five years before the merits of the complaint are finally resolved. Adopting Petitioners' argument would mean that Respondent's decision to terminate Guy is still "tentative and non-final" not withstanding the fact that Guy has not been employed by Respondent since October 25, 1971.

An appellate process, whether in a grievance procedure or in the courts, is a challenge by the aggrieved individual to the correctness of a decision, and the fact that a person utilizes his right of appeal does not make that initial decision tentative. To hold otherwise would mean for example, that a lower court could never issue a final order, and yet, it is only final orders which are appealable.

Commencing the running of the limitation period as of the date the grievance is denied suffers the same defects and produces the same inequities as have been discussed previously with regard to the applicability of the tolling theory to the facts of this case. Because each grievance procedure is designed and controlled by the parties to a collective bargaining agreement, there is no accurate means of predicting when, if ever, a grievance procedure will be completed. Thus, under Petitioners' theory it could be years after the subject of the grievance occurred before the limitation period would even begin to run.

On the other hand, beginning the limitation period from the date employment was actually severed provides a definitive point in time from which to compute the period. *See Olson, supra.* An act of discharge is complete at the time the employment relationship is severed, regardless of whether or not an individual decides to appeal that decision. The appeal does not negate the finality of the decision at the time it was rendered.

Petitioner Guy in this case was protesting the Company's act in discharging her and was seeking reinstatement as the remedy.

A request for reinstatement would be meaningless unless the discharge had been implemented. Section 706(d) of the Civil Rights Act of 1964 requires that the limitation period for filing charges commence running from the date the alleged unlawful practice occurred. In this case, the alleged unlawful employment practice occurred October 25, 1971, and any charges filed with the Commission must be timely filed in relation to that date.[29]

III

The 1972 Amendment Enlarging the Time for Filing a Title VII Charge Is Not Applicable to This Case

A. The question regarding retroactive application of 42 U.S.C., Sec. 2000e-5(e) was not raised by a party with standing and is not properly before this court

The issue of retroactive application of 42 U.S.C., Sec. 2000e-5(e) was raised initially by the EEOC as *amicus curiae* in its brief to the Court of Appeals. An *amicus curiae* is not a party to a suit and has no standing to raise issues on appeal which were not raised by the parties. *Kansas City v. Kindle, Mo.*, 446 S.W.2d 807 (Mo. Sup. Ct. 1969); *State ex rel. Burg v. City of Albuquerque*, 249 P. 242, 31 N.M. 576 (Sup. Ct. 1926). The purpose of an *amicus curiae* is to advise the court on facts and

[29] Petitioner also argues that the Personnel Director's denial of the grievance on November 18, 1971, is in itself a discriminatory act which commences the limitation period. This Court does not need to reach a determination on this contention. In addition to the untimeliness of raising this issue initially in Petitioner's brief, Petitioner has never filed a charge with the EEOC alleging this as an unlawful employment practice and, therefore, the courts are without jurisdiction to consider this argument. The charge filed by Guy on February 10, 1972, states, "I was discriminated against because of my race (Negro) in that I was terminated while on sick leave, even though established procedures regarding sick leave were followed."

matters pending for determination. He cannot assume the function of a party but must accept the case before the court with the issues as presented by the parties. As the EEOC had no standing to raise the issue of retroactivity, the question is not properly before this Court for review.

As stated previously, the rule of practice is settled that this Court will not undertake to review issues which were not considered or decided by the District Court or Court of Appeals *Brockett v. Brockett*, 44 U.S. 691 (1845); *Walters v. City of St. Louis*, 347 U.S. 231 (1954); *United States v. Estate of Donnelly*, 397 U.S. 286 (1970). Only those questions which were definitively raised and litigated below may be reviewed. *Blair v. Oesterlein Mach. Co.*, 275 U.S. 220 (1927); *McGrath v. Manufacturing Trust Co.*, 338 U.S. 241 (1949); *California v. Taylor*, 353 U.S. 553 (1957).

There is no averment in the Complaint relating to retroactivity, nor was the issue litigated at the trial level. The only argument Petitioner Guy presented before the District Court was that the ninety-day period was tolled by the filing of a grievance pursuant to a collective bargaining agreement. That Petitioner was basing her case solely on the tolling theory is stated by Petitioner in Plaintiff's Motion to Reconsider the Court's Order Granting Defendant's Motion to Dismiss, "Our position is that so aptly described by the Sixth Circuit Court of Appeals in the case of *Schiff v. Mead Corp.*, — F.2d —, 3 EPD 8043 (6th Cir. 1970),[30] which we again reiterate should

[30] In *Schiff*, subsequent to an order by the District Court dismissing plaintiff's complaint for failure to file timely charges with the EEOC, the Commission having learned that plaintiff first initiated action under established grievance procedures reversed its prior determination that the charges were untimely. Because of the Commission's action in reversing its decision subsequent to the District Court's ruling and because of the reliance the District Court had placed upon the EEOC's interpretation and application of 42 U.S.C., Sec. 2000e-5(d), the Sixth Circuit vacated and remanded for further consideration the judgment of the District Court.

be controlling and dispositive of the issue now before this Court." (A. 29a).

Because the question of retroactivity was not raised in the District Court by any party to the case, the Court of Appeals held that the issue was not properly before the Court for consideration and refused to decide the issue.[31] The Court through Circuit Judge Weick stated, "The sole appellate issue is whether the filing of the grievance tolled the jurisdictional requirements of the Act." (Pet. 2a). Indeed, if the Sixth Circuit had considered the issue of retroactivity properly before it, they undoubtedly would have remanded the issue to the District Court for its consideration.

The only issue which has been decided by the lower Courts is that of tolling. As the issue of retroactivity has not been timely raised by a party with standing and as it has not been litigated or determined below, it should not be considered by this Court.[32]

B. 42 U.S.C., Sec. 2000e-5(e) should not be applied retroactively so as to revive petitioner's barred charge

Should this Court undertake to decide the issue of retroactivity, it is respectfully submitted that the Court should find

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[31] By way of dicta, the Sixth Circuit noted that as Petitioner's claim was barred and extinguished prior to the effective date of the 1972 Amendments, the increase of time to file charges allowed by these Amendments could not revive Petitioner's claim.

[32] It is argued in the Brief for the United States as Amicus Curiae, p. 11, that the question of retroactivity concerns a jurisdictional allegation and may be raised initially at the appellate level pursuant to 28 U.S.C., Sec. 1653 that, "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." The allegation in this case, however, is not one of defective jurisdiction, but rather is an assertion that the District Court possessed jurisdiction. It does not, therefore, come within the intent of 28 U.S.C., Sec. 1653.

that 42 U.S.C., Sec. 2000e-5(e) does not extend retroactively so as to revive Petitioner Guy's barred charge. It is a well-established principle that an action which is already barred by limitations when it is brought cannot be revived by an act of the legislature. *Fullerton-Krueger Lumber Co. v. Northern Pac. Ry.*, 266 U.S. 435 (1925); *Danzer & Co. v. Gulf & S. I. R. Co.*, 268 U.S. 633 (1925); *James v. The Continental Insurance Co.*, 424 F.2d 1064 (3rd Cir. 1970). The limitation period in force at a time an action is brought governs the case and determines the right of a party to maintain suit. *Patterson v. Gaines*, 47 U.S. 550 (1848).

At the time Petitioner's action arose, the applicable limitation period for filing charges was ninety days. As discussed previously, the ninety-day requirement is more than a statute of limitation; it is a jurisdictional prerequisite to maintenance of any action pursuant to Title VII and is prescribed in the same statute which creates the right. Commenting upon the law with regard to extending such periods by Congressional amendment, the Court in *Snyder v. Yoder*, 176 F. Supp. 617 (N.D. Ohio, 1959), stated:

> "While as a general rule it is true that a period of limitations may be extended by an amendment of the statute of limitations, prior to the expiration of the previously controlling period, . . . the situation is different where the statute creating the right also prescribes the limitation period. In that event, it is held that compliance with the time limitation is a condition to the bringing of the action, and not just a limitation thereon, and that the limitation called for in the original statute bars the action, notwithstanding any amendment of the statute thereafter." 176 F. Supp. at 623.

The ninety-day period within which Petitioner could file a charge with the EEOC expired on January 24, 1972. Petitioner

did not file her charge until February 10, 1972. On this date, not only was Petitioner's charge barred as untimely but any right of action which Petitioner may have had pursuant to Title VII was extinguished. The ninety-day provision of the Act is a limit set to the power of the Commission as distinguished from a rule of law for guidance in reaching a decision. *Cf. Louisville Cement Co. v. I.C.C.*, 246 U.S. 638, 642 (1918).

Petitioners argue, however, that Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 113 (March 24, 1972) applies 42 U.S.C., Sec. 2000e-5(e) retroactively, allowing the Commission to automatically assume jurisdiction over Petitioner's charge on March 24, 1972, the effective date of the Amendments. Section 14 of the Equal Employment Opportunity Act of 1972 states that "The amendments made by this Act to Section 706 of the Civil Rights Act of 1964 shall be applicable with respect to *charges pending with the Commission* on the date of enactment of this Act and all charges filed thereafter." (emphasis added). It is submitted that the sweeping interpretation of Section 14 which Petitioners urge this Court to adopt not only violates recognized rules of law prohibiting revival of barred claims but is supported neither by legislative history nor the common understanding of the word "pending."[33]

Section 14 was not included in the original 1972 Senate and House bills but was added by amendment on the floor. When

[33] The cases of *Brown v. GSA*, 44 U.S.L.W. 4704 (1976) and *Place v. Weinberger*, 44 U.S.L.W. 3714 (1976), relied upon by Petitioners are inapposite. (Brief for Petitioner in No. 75-1264, p. 46; Brief for Petitioner in No. 75-1276, p. 25). There was no allegation in either of these cases that the charge was not timely filed with the GSA Equal Employment Opportunity Office. Thus, unlike the situation here, the charges in *Brown* and *Place* were pending with the agency at the time Section 717 of Title VII was made applicable to them. Furthermore, *Brown* and *Place* were premised on the finding that the Civil Rights Act of 1964, as amended, provides the exclusive judicial remedy for claims of discrimination in federal employment, a theory which has been repudiated with regard to discrimination in private employment.

reported out of their respective committees, both Senate and House bills specifically provided that the 1972 Amendments to Section 706 would *not* apply to charges filed prior to the effective date of the amendments. S. 2515, 92nd Cong. 2nd Sess., Sec. 13 (1972); H.R. 1746, 92nd Cong. 2nd Sess. Sec. 10 (1972). On February 21, 1972, Senator Jacob Javits (R., N.Y.) offered an amendment to delete the word "not" and thereby make the 1972 Amendments applicable to pending charges. 118 Cong. Rec. 4816, 92nd Cong. 2nd Sess. (Feb. 21, 1972). The amendment was proposed by Senator Javits at the request of the Department of Justice which was concerned that the new enforcement provisions of Section 706 would apply only to charges filed after its effective date of March 24, 1972. The sentiments of the Department of Justice were expressed in a letter to the Senate minority leader requesting the amendment:

> "We see no reason why the many thousands of persons who have filed charges which are still being processed and who have waited as long as 18 months to two years for resolution of them should not have the benefit of the new enforcement authority." Quoted in *EEOC v. Christiansburg Garment Co., Inc.*, 376 F.Supp. 1067, 1074 (W.D. Va. 1974); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1355, n.4 (6th Cir. 1975).

The purpose and concern of Congress in passing Section 14 was to make the new authority granted the Commission to bring suit against alleged violations applicable to pending claims. The intent was not to revive charges which were barred by failure to comply with the prescribed jurisdictional requirements. In fact, it probably never occurred to Congress that Section 14 would be used to apply time limits retroactively in order to revive barred charges. If such a thought had crossed their minds, then undoubtedly there would have been discussion of the proposed amendment. As it was, Section 14 was passed by the Senate without debate on the same day it was proposed. 118 Cong. Rec. 4816 (1972)

That Congress did not intend the expansive reading of Section 14 which Petitioners ascribe to it is also demonstrated by the expressed restriction of the applicability of the 1972 Amendments to charges pending with the Commission on the date of enactment of the Amendments. Thus, Congress did not intend the 1972 Amendments to apply to all charges filed prior to March 24, 1972, but only to those charges which can be classified as "pending" with the Commission as of that date. A charge that is barred and extinguished prior to March 24, 1972, cannot be interpreted to be "pending" on that date. To hold otherwise would distort the common understanding and meaning of the word "pending".

The few courts which have construed the word "pending" in the context of Section 14 have interpreted it to mean charges which are in the actual process of investigation, negotiation and conciliation by the EEOC. *See EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352 (6th Cir. 1975); *EEOC v. Christiansburg Garment Co., Inc.*, 376 F.Supp. 1067 (W.D. Va. 1974); *EEOC v. United Aircraft Corp.*, 383 F. Supp. 1313 (D. Conn. 1974).

The mere acceptance by the EEOC of a charge filed by a charging party is not equivalent to the actual processing of a charge.[34] Although Petitioners argue that the EEOC accepted Guy's charge on February 10, 1972, and that the agency's determination as to its jurisdiction should be controlling (Brief for Petitioner in No. 75-1276, p. 25), what they fail to mention is that when Guy filed her charge, she told the Equal Employment Officer, as noted on the Charge of Discrimination, that the most recent date on which discrimination occurred was January 29,

[34] This distinction is noted in the Commission's rules on procedure where it is stated that in cases where the date of occurrence of the alleged unlawful employment practice is not known the charge should be accepted for later processing and the relevant dates determined during investigation. EEOC Compliance Manual CCH Para. 181, Sec. 2.1(e).

1972![35] Had the Commission been given the correct information by Guy, it undoubtedly would not have accepted her charge as timely, and it certainly cannot be argued that Guy in delaying her filing was relying upon a theory of tolling or that such acceptance by the EEOC of her charge was based in any way on tolling. Equity surely dictates that under these facts Petitioner Guy should not be allowed to profit from her own wrong.

As a creation of the legislature, the EEOC's authority is conferred and defined by statute. Title VII specifically limits the Commission's power to investigate and determine only those charges which have been timely filed. In this case, the Commission's authority to investigate and determine Petitioner's charge expired on January 24, 1972, because of the failure of Petitioner to file her charge within the defined statutory time period. As Petitioner's charge was barred on January 24, 1972, and as her right to pursue her Title VII remedies was effectively extinguished as of that date, it cannot be said that Petitioner's charge was "pending" with the Commission on March 24, 1972.

At the least, it can be said that the question of whether Congress intended the extensions of the statutory limitations period to be applied retroactively is uncertain. Even the Ninth Circuit which has indicated its view that the 180-day period should be applied retroactively has admitted that the question is "not free from doubt." *Davis v. Valley Distributing Co.*, 522 F. 2d 827, 830 (9th Cir. 1975).[36] It is a recognized rule of statutory con-

[35] There is absolutely nothing in the record to indicate the relevance of this date.

[36] In *Davis*, plaintiff filed his charge on March 14, 1972 with the EEOC, which referred the charge to the Arizona Commission on March 24, 1972. Two days later the Arizona Commission returned the charge to the EEOC without further action. The Ninth Circuit held that as appellant's claim was not formally filed until the EEOC assumed jurisdiction after the claim was returned by the Arizona Commission, the charge fell within the literal words of the 1972 statute making the amendments applicable to all charges filed after

struction that "a law is presumed, in the absence of clear expression to the contrary to operate prospectively." *Hassett v. Welch*, 303 U.S. 303, 314 (1938); *Claridge Apartments Co. v. Commission*, 323 U.S. 141 (1944); *Fullerton-Krueger Lumber Co. v. Northern P. Ry. Co., supra; Weldon v. Bd. of Educ. School District, City of Detroit*, 403 F. Supp. 436 (E.D. Mich. 1975). There is no "clear expression" that Congress intended Section 14 to apply the increased time period of 42 U.S.C., Sec. 2000e-5(e) retroactively. To the contrary, both logic and reason as well as judicial opinion and the legislative history of the 1972 Amendments support the view that Section 706(e) should not be given retroactive effect in this case.

CONCLUSION

Based upon the foregoing authorities and arguments and the record as a whole, it is respectfully requested that the judgment of the Court of Appeals for the Sixth Circuit be affirmed.

Respectfully submitted,

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the effective date March 24, 1972. Thus, the Court's expression of its views on the retroactive application of 42 U.S.C., Sec. 2000e-5(e) is dictum.

Certificate of Service

I hereby certify that on August 27, 1976, three copies each of the foregoing were mailed, air mail postage prepaid, to counsel of record, Barry L. Goldstein, 10 Columbus Circle, New York, New York 10019 and Ruth Weyand, 1126 Sixteenth Street N. W., Washington, D. C. 20036.

Donna K. Fisher